No. 11635.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COAST VAN LINES, INC.,

Appellant,

vs.

BERT ARMSTRONG, L. A. CHARETTE, KING FISHER, DAVE GARCIA, EARL GRAHAM, IRA C. HOLDER, LOUIS KANIR, EMERY KEY, RICHARD MAGNUS, LEON T. MCCROSSEN, GEORGE W. PETERSON, THOMAS P. REMUS, JOE P. SEVEDRA, SIDNEY H. SMITH, LOUIE VAUGHN, NOBLE F. WHITE, HAROLD N. WHEELER and MORRIS WOLF,

Appellees.

APPELLEES' REPLY BRIEF.

CHARLES E. BEARDSLEY,
601 Rowan Building, Los Angeles 13,

HERBERT V. WALKER,
PERRY BERTRAM,
744 Chamber of Commerce Building, Los Angeles 15,
Attorneys for Appellees.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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APPELLEES' REPLY BRIEF.

Statement re Jurisdiction and re the Pleadings.

Appellees concur in the Appellant's Statement re Jurisdiction (Op. Br. p. 1) and in its statement of the pleadings (Op. Br. p. 3).

Statement of the Case.

During the period to which the appellees' claims relate, appellant was engaged in packing, crating, storing, and transporting household goods [amended complaint, R. p.

4; amended answer, R. p. 7; Finding of Fact IV, R. p. 14]. The appellees were employed as packers, craters, warehousemen, weighers, or stencilers and people whose job was a combination of driving and packing or helper. One was a mechanic's helper.

The crater (Armstrong) worked in the company's warehouse, crating household effects for long haul shipment [R. 78, 79].

The packers (Charette, Fisher, Holder, Magnus, McCrossen, Wolf, Vaughn)[1] generally drove to their place of work in a small truck in which they carried their packing materials. There they did the packing and left the packed goods for later pick-up by a moving van [R. pp. 55, 58, 198, 204-205]. Occasionally they rode to the place of work in the moving van, did their packing and sometimes helped load the packed goods into the van [R. pp. 227-228].

Approximately 75% to 80% of their time was spent in packing and the balance in driving to and from the houses in which they did their packing [R. pp. 203, 205, 230].

The driver-packers (Garcia, Graham, Key, Peterson, Smith) drove trucks to the houses, packed the goods, placed them in the trucks and drove them back to the warehouse [R. pp. 189, 85-86, 270-271]. They also delivered goods to the homes where they unpacked them.

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[1]The classification is necessarily inexact because some employees had combination duties and others worked in different jobs at different times.

The helpers (Savedra, White) did substantially the same, except that they seldom did any driving [R. pp. 214-215].

The warehousemen (Kanir, Key, Remus) performed the usual warehouse duties of storing goods brought in and taking goods from storage for shipment or delivery, weighing and stencilling.

The mechanic's helper (Wheeler) during one period assisted the mechanic in making repairs to the trucks [R. pp. 223-226], and the remainder of his employment he oiled, gassed and greased the trucks [R. p. 223].

None of these men did any driving across state lines or on long hauls. Their driving was confined to local trips between warehouse and house. Likewise, any loading performed by them was loading for the haul between the house and the warehouse, never on any trucks for long haul or out of state shipment.

During the entire period here involved, up to 60% to 75% of the appellant's work was performed under Navy contract [R. pp. 46, 51, 73, Deft. Ex. C] in which the Navy paid for the moving of household goods of its personnel. By dollar volume in six month periods, the business ranged from 45% to 60% government contract [R. pp. 142-145]. A flat rate per hundred pounds was charged for packing and shipping under the government contract, while individuals paid so much per hour for packing and so much per hour for shipping. [R. 166, Deft. Exs. G, H. I, J]. The Navy contracts were obtained by either negotiation or competitive bidding [Deft. Exs. G, H, I, J]. The appellees spent up to 100% of their time on this work.

Summary of the Argument.

I. The appellant was not a retail establishment because it made no retail sales.

II. The appellant was not a service establishment because the majority of its activities were performed for the United States Government pursuant to Navy contracts and a substantial portion of its business was for commercial and industrial customers.

III. None of the employees here involved, with the possible exception of the mechanic's helper and certain drivers, performed any duties affecting safety of operations. Appellant failed to show that any employee, including drivers and the mechanic's helper, performed any duties affecting safety of operations in interstate transportation. Appellant failed to show in which work weeks if any, any employee performed any duties affecting safety of operations in interstate transportation.

ARGUMENT.

I.

Appellant Was Not a Retail Establishment Because It Made No Retail Sales.

Section 13(a)(2) of the Fair Labor Standards Act of 1938 exempts from the overtime and minimum wage provisions . . . "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce . . ."

Obviously, a retail establishment is one making retail sales of merchandise, rather than one providing services. (See Wage and Hour First Annual Report (1939), page 21, summarized in Commerce Clearing House, Labor Law Service, para. 25,551.03.) Since appellant sold no merchandise, it was for that reason alone, not a retail establishment. In addition, it was not a retail establishment for the further reasons, discussed below, which prevent it being classified as a service establishment.

II.

Appellant Was Not a Service Establishment Because Approximately Half of Its Business Was Done for the Government Pursuant to Navy Contracts.

A. The Service Establishment Exemption Is Limited to Establishments Comparable in Character to Retail Stores. Appellee's Plant Was Not Comparable to a Retail Establishment.

The District Court found [R. pp. 17-18] that appellant's establishment was not a service establishment nor a retail establishment within the meaning of section 13(a)(2) of the Act. This finding was in accordance with the evidence and conformed to the construction of

the exemption adopted by the Administrator of the Wage-Hour and Public Contracts Divisions, United States Department of Labor. The Administrator's position is in accordance with the language and structure of the statutory provisions and is supported by the legislative history of the act.

B. Legislative History.

The legislative history of the act demonstrates that the exemption was rooted in a desire to protect small retailers selling *directly* and primarily to the general consuming public. The original bills contained no exemption for retail or service establishments. Section 2(a)(7) of the Senate Committee Bill (S. 2475), passed by the Senate July 31, 1937, and by the House May 24, 1938, as Section 11(a)(1), provided an exemption for employees working in a "local retailing capacity." But the apparent source of Section 13(a)(2) was an amendment offered by Representative Celler excepting "any retail industry, the greater part of whose sales is in intrastate commerce" which he proposed in order to dispel all doubt as to the exemption of "retail dry goods, retail butchering, grocers, retail clothing stores, department stores" (83 Cong. Rec. pp. 7437, 7438). The amendment passed the House but was never enacted. Other references to the status of retailers found in the Congressional debates and in the hearings conducted during consideration of the act, such as the statement of Mr. Justice Robert H. Jackson, then Assistant Attorney General, that the act was not intended to apply to the retailer, filling station attendant, and pants presser, indicate a uniform purpose to exclude the neighborhood merchant (Joint Hearings before the Senate Committee on Education and Labor and the House Com-

mittee on Labor on S. 2475 and H. R. 7200, June 2, 1937, p. 35).

The exemption in substantially its present form, appears for the first time in the confidential Conference Committee prints dated June 10, 11 and 12, 1938, respectively. These drafts excepted "any employee engaged in any *retail establishment* the greater part of whose selling is in intrastate commerce." (Italics supplied.) In the Conference Committee report dated June 11, 1938, the words "or service" and "or servicing" were added (H. Rept. 2738, 75th Cong., 3d sess., 1938). Thus, the exemption as finally enacted appeared for the first time in the draft of the section contained in this final Conference Committee report. The explanation of the exemption in the report merely repeated the language of Section 13(a)(2) (*id.* at 32). The Conference Committee's version of the bill was adopted by both Houses of Congress on June 14, 1938 (83 Cong. Rec. 9178, 9266-9267), just three days after the language in question first appeared. The new language provoked no discussion on the floor of either the House or Senate.

The absence of expression or comment upon the modification indicates that no far-reaching extension of the original exemption for retail establishments was contemplated by the last minute addition of the words "or service." This legislative history was relied upon by the court in *Fleming v. A. B. Kirschbaum Co.*, 124 F. (2d) 567, 572 (C. C. A. 3), affirmed, 316 U. S. 517, in refusing the exemption to the owner of a loft building who rented space to manufacturers.

The purpose of the addition was to make clear that the exemption included those closely related establishments which sell intangible services rather than merchandise,

such as barber shops, beauty parlors, home laundries, valet shops, service stations, and other analogous businesses dealing with private consumers. In regard to their customers, location, appearance, personnel, and hours of business, such establishments closely resemble the "retail establishment" with which they are grouped in the exemption. These two very similar kinds of establishments presented a common problem in framing the statute and it is reasonable to infer that Section 13(a)(2) provided a common solution. Clarification was probably regarded as necessary to dispel the connotation of selling goods rather than services which may have been attributed to the phrase "retail establishment."

C. Language and Structure of Exemptive Provision.

The view that the exemption extends only to service establishments retail in nature is buttressed by the grammatical construction of the exemption itself. Not only are the related terms coupled in the same sentence, they are used in the disjunctive, modify the same word "establishment" and the same criterion of intrastate commerce applies to each. It was natural, therefore, for the Administrator and the courts to conclude that service establishments and retail establishments should be similarly limited to those who deal *directly* with the consumer, for, as stated by Circuit Judge Learned Hand, "the juxtaposition of retail selling and 'servicing' does indeed suggest as much." *Fleming v. Arsenal Bldg. Corp.,* 125 F. (2d) 278, 280 (C. C. A. 2), affirmed, 316 U. S. 517.

D. Judicial Construction.

The United States Supreme Court and all Circuit Courts of Appeals that have passed upon the question have indicated that the service establishment exemption is comparable in scope to the exemption for retail establishments.

The Second Circuit in *Fleming v. Arsenal Bldg. Corp.*, 125 F. (2d) 278, 280, in denying the exemption to the owner of a loft building which rented space and provided other services to its tenants, said:

> "* * * Possibly it is not a 'service establishment' at all; perhaps that phrase should be limited to those who serve consumers directly, like tailors, or garages, or laundries; the juxtaposition of retail selling and 'servicing' does indeed suggest as much."

The Third Circuit in *Fleming v. A. B. Kirschbaum Co.*, 124 F. (2d) 567, 572-573, under facts virtually the same as in the *Arsenal* case, after referring to the legislative history, stated:

> "* * * From this it is fair to infer that the type of establishment meant is that which has the ordinary characteristics of a retail establishment except that it sells services instead of goods. In other words it is an establishment the principal activity of which is to furnish service to the consuming public. Typical retail establishments are grocery stores, drug stores, hardware stores, and clothing shops. In *Wood v. Central Sand & Gravel Co.*, D. C. W. D. Tenn. 1940, 33 F. Supp. 40, 47, the court suggested as illustrations of what Congress meant by service establishments 'barber shops, beauty parlors, shoe-shining parlors, clothes pressing clubs, laundries, automobile repair shops.' We think these illustrations apt."

In *Kirschbaum Co. v. Walling,* 316 U. S. 517, the Supreme Court affirmed the judgments in both cases, stated that the asserted exemption "need not detain us long," and held (p. 526):

> "The petitioners' buildings cannot be regarded as 'service establishments' within the exemption of Sec. 13(a)(2). Selling space in a loft building is not the equivalent of selling services to consumers * * *."

The Fifth Circuit, in *Walling v. Sondock* (1942), 132 F. (2d) 77, recognized that the service-establishment exemption was limited to concerns performing services of a retail character. The court "upon the authority of *Kirschbaum v. Walling,* and by analogous reasoning," denied the exemption to a detective agency which furnished guards and watchmen to commercial and industrial customers. The opinion contained a footnote reference to portions of the legislative history described above and to the pages of the Congressional Record (83 Cong. Rec. 7436-7438) which included Representative Celler's statement of intention to exempt "retail dry goods, retail butchering, grocers, retail clothing stores, department stores."

Similarly, the Ninth Circuit, in *Consolidated Timber Co. v. Womack* (1942), 132 F. (2d) 101, denied the exemption to "cookhouses" provided by a lumber company for the convenience of its employees. The court was of the opinion "that an ordinary restaurant or eating place 'renders a service' rather than 'makes a sale,' and that a restaurant is a 'service' rather than a 'retail' establishment." It held, however, that the employer was not entitled to the exemption for the reason, among others, that (p. 1011):

> "* * * The principal activity of the cookhouse definitely, was not to furnish service to the consuming

public, as such, but was to serve the employees of the Company."

So here the principal activity of appellant was not to furnish service to the consuming public, as such, but was to serve the personnel of the Navy.

The evidence clearly establishes in this case that for the period in question approximately one-half of appellant's business was work directly for the Navy[2] under annual contracts obtained by bids or negotiated with the Navy wherein the appellant undertook to move goods belonging to Navy personnel at fees and prices established by the contracts. These fees and prices were different from those charged to the individual customer. The Administrator of the Wage-Hour and Public Contracts Division has taken the official position that firms engaged in moving and storing household goods are not retail or service establishments if they serve governmental agencies. "Some warehousemen handle goods for private individuals but in addition they serve governmental agencies, institutions, industrial or business concerns and others who are removed from 'the private individual' category. Work of this kind is usually performed on a large scale frequently following contract bidding and almost always at prices lower than those charged private customers; transactions of this kind are not exempt. If the gross receipts from non-exempt work becomes 'substantial'—that is if such receipts exceed twenty-five percent of the gross receipts of the establishment—the establishment will no longer be

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[2]Moreover, during the entire period here involved, appellant held itself ready and agreed to devote 100% of its man-hours and facilities to the government work [Deft. Exs. E (p. 15), G (p. 8), H (p. 11), and I].

considered as a service establishment and if any part of its business is interstate, its employees will be subject to the act." Wage and Hour Release, No. T-31, February 6, 1942.[3]

This position conforms to other governmental usage. For example, the Bureau of the Census classifies as wholesale sales, "sales of goods or merchandise to trading establishments of all kinds, to institutions, industrial, commercial and professional users and sales to governmental bodies." (U. S. Census of Business, 1939, Instructions to Enumerater for Business and Reference, p. 18; also Volume 1 Retail Trade, p. 1; Volume 2 Wholesale Trade, p. 1.) See also *Roland Electrical Co. v. Walling,* 66 Sup. Ct. 43 referring to said classification.

In opposition to these clearcut pronouncements, appellant relies upon *Lonas v. National Linen Service Corp.,* 136 F. (2d) 433, cert. den. 320 U. S. 785, and the District Court decision in *Guess v. Montague,* 51 Fed. Supp. 61.

Whatever persuasiveness the *Lonas* case may previously have had in this circuit in the face of the contrary principles adopted by this court in *Consolidated Timber Co. v. Womack* (1942), 132 F. (2d) 101, it is no longer entitled to any consideration in view of the decision of the

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[3]While the official position taken by the administrator is indicative of the manner in which he intends to enforce the law and therefore not binding upon the courts, nevertheless the Supreme Court has held that the interpretations expressed by him are entitled to great weight and should be followed in the absence of a clear demonstration of their error. See *U. S. v. American Trucking Associations Corp.,* 310 U. S. 554; *U. S. v. Darby Lumber Co.,* 61 Sup. Ct. 451, 459; *Overnight Motor Co. v. Missel,* 316 U. S. 572.

Supreme Court in *Roland Electrical Co. v. Walling* (1946), 66 S. Ct. 413.[4]

Guess v. Montague, 51 Fed. Supp. 61, was reversed by the Circuit Court of Appeals, Fourth Circuit, 140 F. (2d) 500.

In *Wood v. Central Sand & Gravel Co.,* 33 Fed. Supp. 40, also relied upon by appellants, the court held the exemption inapplicable, saying,

> "Nor could such supply house be deemed a retailer, when the major portion of its sales—many in bulk lots—were made to a city of more than 250,000 inhabitants, to a large State, to an important Governmental agency, the Works Progress Administration, and to many contractors who use the material in their construction work."

Thus, it is uniformly recognized that sales or service to the government or an agency thereof are not within the contemplation of the exemption. It is immaterial that the Navy in this case was providing the facilities for its personnel so that the situation by its nature required appellant to pack, move and store household effects belonging to individual enlisted men and officers. The determining factor is that the work was ordered and provided by the

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[4]The Court stated that *certiorari* was granted because of the divergence of opinions among the Circuit Courts, and in its footnote referred to the *Lonas* case as opposed to such cases as *Fleming v. Kirschbaum Co.,* 124 F. (2d) 567, 572; *Fleming v. Arsenal Bldg. Corp.,* 125 F. (2d) 279, 280; *Guess v. Montague,* 140 F. (2d) 500; and *Bracey v. Luray,* 138 Fed. (2d) 8. By enunciating the principles which had been followed in the latter cases, the Supreme Court thereby indicated that the *Lonas* decision was erroneous.

Navy for its own purposes to facilitate its own part in the prosecution of the war. The movement of the men, and with them their belongings, was to accomplish the government's purposes and did not serve any individual needs of the men.

Moreover, it appears that over 11% in dollar volume, of appellant's business was derived from commercial, industrial and business customers (including some government work other than Navy personnel). [Deft. Ex. C.]

Accordingly, whether or not appellant extended any personal "services" to its private customers or to the Navy personnel during this period[5] is immaterial. As this court recognized in *Consolidated Timber Co. v. Womack,* 132 F. (2d) 101, a restaurant may be a retail or service establishment, but if it substantially serves an industrial purpose, it is not such an establishment within the meaning of the exemption. As the authorities hold, the same distinction exists where the operation serves a governmental purpose.

Accordingly, since half of appellant's business was performed for the Navy, at contract prices set by annual contracts, and since an additional 11% of its business was derived from industrial, business and commercial customers, appellant was not a service establishment.

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[5]It appears from the testimony of appellant's secretary summarized on pages 14 and 15 of Appellant's Opening Brief that he was describing activities at the time of trial, not at the times here involved. In any event it is clear that he was not describing activities related to movement of Navy personnel goods.

III.

Appellees Were Not Employees of a Motor Carrier Whose Duties Affected Safety of Operations in Interstate Transportation.

The court below found that none of the appellees devoted a substantial portion of his time to activities which would bring him within the power of the Interstate Commerce Commission to establish qualifications and maximum hours of service under the provisions of Section 204 of the Motor Carrier Act.

As with the retail and service establishment exemption and each of the other exemptions from the minimum wage or overtime provisions of the Fair Labor Standards Act, the exemption created by Section 13(b)(1) of that act is subject to strict construction against those claiming the exemption.

> *Walling v. Gordon's Transports* (W. D. Tenn. 1945), 10 Labor Cases, par. 62,934, aff'd *per curiam* (C. C. A. 6, 1947), 162 F. (2d) 203, cert. den. .....U. S. ....., 68 S. Ct. 74;
>
> *Fletcher v. Grinnell Bros.* (C. C. A. 6, 1945), 150 F. (2d) 337.

The burden of proof is upon the appellant claiming the exemption to establish by a preponderance of the evidence the facts which clearly demonstrate that the employees are within the exemption.

> *Walling v. Gordon's Transports* (W. D. Tenn., 1945), 10 Labor Cases §62,934, aff'd *per curiam* (C. C. A. 6, 1547), 162 F. (2d) 203;
>
> *Rockton and Rion R. R. Co. v. Walling* (C. C. A. 4, 1944), 146 F. (2d) 111, cert. den. 324 U. S. 880;
>
> *Helliwell v. Haberman* (C. C. A. 2, 1944), 140 F. (2d) 833.

In order to demonstrate this proposition, the appellant must have established by a preponderance of the evidence that each of the appellees devoted a substantial part of his time to activities which directly affect the safety of the operation of motor vehicles in interstate transportation.

Levinson v. Spector Motor Service, 91 L. Ed. 846;

Pyramid Motor Freight Corp. v. Ispass, 91 L. Ed. 869.

"If none of the alleged 'loading' [similarly driving, helping and mechanical work] activities of the respective respondents during the period at issue come within the kind of activities which, according to the commission, affect the safety of operation of motor vehicles in interstate or foreign commerce within the meaning of the Motor Carrier Act, then those respondents of which that is true are entitled to the benefits of Section 7 of the Fair Labor Standards Act."

Pyramid Motor Freight Corp. v. Ispass, 91 L. Ed. 869, 875.

Further as the Supreme Court pointed out in the *Pyramid Motor* case, the title by which the employee is classified by himself or his employer is not determinative. The question before the District Court was whether the activities of the employees were the kind of activities which are held by the Interstate Commerce Commission to affect safety of operation.

As to certain of the employees, there is no evidence that any of their activities affected safety of operations and all of the evidence showed they did not. These include the following employees:

Craters: Armstrong, Savedra [3½ months, Tr. 186];

Warehousemen: Kanier, Key, Holder,[6] Remus;

Oiler and greaser: Wheeler (January through March, 1944);

Packers: Charette, Fisher, McCrossen, Wolf.

As to certain other employees, an attempt was made to create an inference that their activities affected safety of operations, because they either drove trucks, rode with the drivers or helped to load. These are primarily the remaining packers: Holder, Magnus, Vaughan.

Careful examination of the record, however, discloses that the inconsequential driving, helping or loading done by these men was not in interstate transportation. These packers operated with small pickup trucks carrying only their packing materials. They did not carry any of the household goods shipped in interstate commerce [Holder, Tr. pp. 211-215; Magnus, Tr. pp. 226-236;[7] Vaughan, after the first six weeks, Tr. pp. 198-203].

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[6]From January 5, 1945, to July 18, 1946 [Tr. pp. 212, 214.]

[7]This employee at one time made a few trips to San Francisco [Tr. p. 230].

Since the decision below (and after appellant filed its Opening Brief) the Supreme Court decided the case of *Morris v. McComb,* 92 L. Ed. 83. This was an action by the Administrator of the Wage-Hour and Public Contracts Divisions, to enjoin violations of the Fair Labor Standards Act with respect to motor carrier drivers and mechanics. The driving (or repair work) of these employees in interstate transportation was but a small percentage of their total driving (or repair work) time—an average of 4%—the balance being spent in intrastate driving (or repair work). The court, pointing out that any of these employees might be called upon to spend a considerable portion of his time in interstate driving (or repair work), held that all were subject to regulation by the Interstate Commerce Commission. The court was at pains to state that the "strictly interstate commerce trips were distributed generally throughout the year and their performance was shared indiscriminately by the drivers and was mingled with the performance of *other like driving services* rendered by them otherwise than in interstate commerce" (p. 90, emphasis added).

In the case at bar, there were no "full-time drivers" as that phrase was used by the Supreme Court in the *Morris* case. The employees here who did any driving spent most of their time in packing household goods in crates and boxes.

With respect to the above mentioned employees and all of the remaining employees, the appellant has failed to

meet its burden of proof as to this exemption in two essential respects.

In the first place, it has not shown the extent to which the various employees devoted themselves to work which might bring them within the exemption. The Supreme Court in the *Morris* case said, "If this were an action to recover overtime compensation for individual employees, it would be necessary to determine that fact." The case before the court now is one to recover overtime compensation for individual employees.

The court below carefully considered all of the evidence and found that no sufficient showing had been made as to the extent to which, if at all, any of the appellees were engaged in activities affecting the safety of operations in interstate transportation.

Secondly, it was the burden of the appellant to establish by a preponderance of the evidence the work weeks, if any, in which any of the appellees were engaged in such activities.

The applicability of any exemption, like the general coverage of the Fair Labor Standards Act is on a week-to-week basis.

> *Hutchinson v. Barry* (D. C. Mass., 1943), 50 Fed. Supp. 292.

The court concluded in that case:

> ". . . the defendant on the most favorable assumptions can have the benefit of the exemption afforded by

> Sec. 13(b) only for those particular weeks in which the defendant sustains the burden of showing that the employee spent a substantial part of his time at activities connected with safety of operations. But that is just what the defendant has not proved. It has no records showing the division of the plaintiff's work week by week, and the evidence is so generalized that no precise finding can be made."

That is precisely the situation here. The appellant patently failed to show that any employee was exempt in any work-week.

The *Hutchinson* decision follows precisely the holding of the Interstate Commerce Commission in such a case:

> "If such a driver does not drive or operate a truck in the transportation of property in interstate or foreign commerce for an entire week he is not subject to the (qualifications and maximum hours of service) regulations herein prescribed during that week."
>
> Ex Parte No. MC-3, 23 M. C. C. (F) 1, 39.

In order to avoid the effect of this conclusion, appellant argues that the summary of its witness Diegel as to the contents of certain records from one day in each of five weeks in July and August, 1945, "is representative of the activities of all of the appellees." Obviously from such sketchy and incomplete information, the court below was obliged to find as it did that the appellant had not shown that any of the appellees were within the exemption.

IV.

Appellees' Counsel Are Entitled to Further Attorneys' Fees on Appeal.

It is the function of this court to fix a reasonable sum as the value of the legal services rendered to the appellees by their counsel upon this appeal.

E. H. Clarke Lumber Co. v. Kurth (C. C. A. 9, 1945), 152 F. (2d) 941;

Republic Pictures Corp. v. Kappler (C. C. A. 8, 1945), 151 F. (2d) 543;

Stanger v. Vocafilm Corp. (C. C. A. 2, 1945), 151 F. (2d) 894.

Counsel for appellees respectfully request that an order be made that appellant be required to pay an additional sum in an amount determined by the court for the services of appellees' attorneys on this appeal.

Conclusion.

The appellant seeking to bring itself within the retail or service establishment exemption and the motor carrier exemption of the Fair Labor Standards Act has failed to meet its burden of proof with respect to either. It has not, as it was required to do, established by the preponderance of the evidence that it was a retail or service establishment or that any of its employees were engaged in any activities affecting the safety of operation of motor vehicles in interstate transportation.

On the contrary, the evidence clearly demonstrates that during the period involved appellant's principal business was with the United States Navy, and that in fact it had agreed and stood ready to devote 100% of its activity to the performance of the Navy contracts. It also shows

that a substantial portion of its business (over 11%) was from commercial, industrial and business customers. Under those facts it was not a retail or service establishment exemption.

The evidence also establishes positively and affirmatively that at least Armstrong, Kanir, Key, Remus, Charette, Fisher, McCrossen and Wolf at no time performed any duties affecting safety of operations of motor vehicles. It also shows that for certain periods Savedra, Holder, and Wheeler engaged in no such activities.

With respect to the remaining employees the evidence fails completely to show that any of them devoted any substantial portion of their time in such activities. Moreover it cannot be determined from the evidence in which work weeks if at all any such activities might have been performed. The evidence therefore abundantly supports the findings of the trial court that none of the appellees were within the motor carrier exemption.

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed, and that this court award appellees' counsel a reasonable attorney's fee for their services on this appeal.

Charles E. Beardsley,
Herbert V. Walker,
Perry Bertram,
Attorneys for Appellees.